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No. 93-1578

In The

Supreme Court of the United States

October Term, 1993

THE DIOCESE OF COLORADO, a Colorado corporation, and BISHOP WILLIAM FREY,

Petitioners,

vs.

MARY E. MOSES, n/k/a MARY ELAINE TENANTRY,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Colorado Case No. 92SA415

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Religious Freedom Restoration Act ("RFRA") should be applied retroactively to a common-law tort action that has been tried to judgment and reviewed by the highest state court prior to the enactment of RFRA, when the state court held only that application of common law to the petitioners' "secular conduct" does not burden the free exercise of religion and no record evidence indicates that the petitioners' tortious conduct was rooted in any religious belief.

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OPINION BELOW

The opinion of the Colorado Supreme Court (pet. app. A) affirming a jury verdict in favor of the respondent is reported at 863 P.2d 310.

JURISDICTION

The petitioners invoke the jurisdiction of this Court under 28 U.S.C. § 1257(a).

STATEMENT OF THE CASE

The respondent Mary E. Moses, n/k/a Mary Tenantry ("Tenantry"), filed suit against the Episcopal Diocese of Colorado ("the Diocese"), the Bishop of the Diocese, William Frey ("the Bishop"), and Father Paul Robinson, an Episcopalian priest ("Robinson" or "the priest"). Her claims included breach of fiduciary duty and negligent hiring and supervision based on the priest's sexual relationship with Tenantry that developed during pastoral counseling and the response of the Diocese and the Bishop to the relationship. Tenantry had a history of severe mental illness, and the tortious conduct of the Bishop and the Diocese caused Tenantry again to become mentally ill. The jury returned a verdict of $728,100 for Tenantry on her breach of fiduciary duty and negligence claims.[1]

[1] The jury returned a $488,400 verdict for Tenantry on her claim that the Diocese and the Bishop were vicariously liable for

The facts underlying Tenantry's claims are recounted in the opinion of the Colorado Supreme Court. Pet. app. A at 1a-12a. Tenantry incorporates those facts by reference. \

The Colorado Supreme Court determined that the evidence at trial was sufficient to support Tenantry's claims for breach of fiduciary duty and negligence in hiring and supervision. The Diocese and the Bishop argued for the first time on appeal that the First Amendment barred tort liability in this case. As the Colorado Supreme Court noted, "[t]he defendants did not argue at trial that the First Amendment forbids [the tort claims in this case]." Pet. app. A at 12a, n.10.[2] Further, the Colorado Supreme Court noted that "[t]he defendants' only argument at trial regarding the First Amendment was [that] it barred admission of two pamphlets that described the hierarchical structure of the Episcopal Church." *Id.*

The Colorado Supreme Court recognized that it need not address the First Amendment defense of the Diocese

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the priest's conduct. The Colorado Supreme Court overturned this portion of the verdict on the ground that the Diocese and the Bishop were not vicariously liable because there was insufficient evidence that the priest was acting within the scope of his employment when he engaged in a sexual relationship with Tenantry. Pet. app. A at 2a-3a.

[2] The Diocese and the Bishop did not assert at trial that Robinson's sexual relationship with Tenantry, the Diocese's failure to provide the parish with Robinson's pre-ordination psychological reports, the Bishop's insistence on Tenantry's silence concerning the priest's sexual conduct, and the Bishop's protection of a priest while disregarding the interests of a parishioner were tenets of the Episcopalian faith protected by the First Amendment.

and the Bishop. Pet. app. A at 12a. However, the court exercised its discretion to address *one* First Amendment argument raised by the Diocese and the Bishop, the argument that Tenantry's tort claims required resolution of disputes over religious doctrine, in violation of this Court's decision in *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Mem. Presbyterian Church*, 393 U.S. 440 (1969). The Colorado Supreme Court held that this case did not require any prohibited resolution of disputes over religious doctrine because, as required by *Presbyterian Church* and other decisions of this Court, this case could be resolved by reference to "neutral principles of law." Pet. app. A at 15a-17a.

The Colorado Supreme Court noted parenthetically in a string citation that, in *Employment Division, Dep't of Human Resources v. Smith*, 494 U.S. 872 (1990), this Court had held that "even religiously motivated conduct is not immune from neutral laws of general applicability." Pet. app. A at 16a. However, contrary to the suggestion in the Diocese's and the Bishop's brief, pet. app. A at 5, the court did not rely on this holding in *Smith* concerning "religiously motivated conduct" but rather on a narrower holding that "[a]pplication of a secular standard to *secular conduct* is not prohibited by the Constitution." Pet. app. A at 16a (emphasis added).

REASONS FOR DENYING THE PETITION

I. Regardless of whether RFRA applies to this case, this case is not worthy of certiorari review because the Colorado Supreme Court's holding is consistent with this Court's well-established precedents, RFRA, and the decisions of all state and lower federal courts.

Assuming *arguendo* that the Religious Freedom Restoration Act ("RFRA"), P.L. 103-141, 107 Stat. 1488 (1993), should be applied retroactively to this case, the decision of the Colorado Supreme Court in this case is consistent with RFRA and raises no unsettled issue of federal law. The Colorado court followed well-settled decisions of this Court in holding that laws burdening conduct not proven to be rooted in religious belief do not violate the First Amendment's free exercise clause.

The Diocese and the Bishop cannot argue that the Colorado Supreme Court ought to have examined evidence concerning the actual impact of tort liability on the Diocese's and the Bishop's religious beliefs: such weighing of evidence in this case is impossible because the Diocese and the Bishop did not present evidence showing whether and how their tortious conduct was required by their religious beliefs. Moreover, nothing in the Colorado court decision relied on *Employment Division, Dep't of Human Resources v. Smith*, 494 U.S. 872 (1990). Therefore, the opinion of the Colorado Supreme Court is completely consistent with RFRA.

A. The Colorado Supreme Court followed well-settled decisions of this Court in holding that legal restriction of "secular conduct" not proven to be rooted in religious belief does not burden the free exercise of religion.

The Diocese and the Bishop have never provided record evidence or even specific allegations showing that their tortious conduct was rooted in any religious belief. Based on this record, the Colorado Supreme Court applied well-settled law to hold that, because the Diocese's and the Bishop's tortious conduct was "secular conduct" that was not rooted in religious belief, the judgment in this case did not burden the free exercise of religion. This holding is consistent with RFRA and with every decision by this Court, lower federal courts, and other state courts. It also raises no important or unsettled principle of constitutional law. Therefore, this Court should deny the Diocese's and the Bishop's petition. Sup. Ct. R. 10.1.

Congress enacted RFRA in response to this Court's decision in *Smith*, 494 U.S. 872. In *Smith*, this Court held that the free exercise clause does not bar states from enforcing generally applicable, religiously neutral rules to prohibit or burden even religiously motivated conduct, such as the use of peyote in religious ceremonies. Believing that laws might undesirably burden important religious liberties even if the laws were general and religiously neutral, Congress enacted RFRA to codify the free exercise jurisprudence in cases decided prior to

Smith. *See* S. Rep. No. 103-111, 103rd Cong., 1st Sess. at 8-9, *reprinted in* 1994 U.S.C.C.A.N. 1892, 1904.[3]

Therefore, RFRA restricts state and federal law only if the law "substantially burden[s] a person's *exercise of religion*." Pet. app. F at 60a (emphasis added). This Court has long held that conduct is not "exercise of religion" unless the conduct is mandated by sincerely held religious beliefs. *See, e.g., Frazee v. Employment Security Dep't*, 489 U.S. 829, 834 (1989) (to prove violation of free exercise clause, litigant must show that burdened conduct "was based on a sincerely held religious belief"); *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 450 (1988) (law does not burden free exercise rights unless it has "tendency to coerce [the Diocese and the Bishop] into acting contrary to their religious beliefs"); *Hobbie v. Unemployment Appeals Com'n*, 480 U.S. 136, 141 (1987) (burdened conduct must be "mandated by religious belief" to be protected by free exercise clause) (quoting *Thomas v. Review Bd.*, 450 U.S. 707, 717-18 (1981)); *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972) ("to have protection of the Religion Clauses, claims must be rooted in religious beliefs"); *Sherbert v. Verner*, 374 U.S. 398, 404 (1963).

Moreover, mere assertion that a law burdens some practices that might *conceivably* be religious has never

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[3] Specifically, section 3 of RFRA provides that "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability" unless the application of the burden "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." Pet. app. F at 60a.

sufficed to show a violation of the free exercise clause. The party asserting a defense based on the free exercise clause has the burden to show with record evidence that his or her conduct is mandated by a sincere religious belief. *Yoder*, 406 U.S. at 215. *See also Messiah Baptist Church v. County of Jefferson, Colorado*, 859 F.2d 820, 824 (10th Cir. 1988) (free exercise clause challenge to zoning ordinance requires "evidence in the record" that location of church "is integrally related to underlying religious beliefs").

Therefore, under both RFRA and all of this Court's well-established free exercise precedents, there is no defense to tort liability unless the specific tortious acts were actually "mandated by religious belief." *Hobbie*, 480 U.S. at 141 (quoting *Thomas*, 450 U.S. at 717-18). The Diocese and the Bishop have the burden of proving with record evidence that their tortious conduct and religious belief are "inseparable and interdependent." *Yoder*, 406 U.S. at 215.

Because the Diocese and the Bishop have not alleged – let alone proven – that their specific tortious acts were "mandated" by their Episcopalian religious faith, they have not properly alleged any defense to tort liability under either the First Amendment or RFRA. Specifically, the Diocese and the Bishop have never argued at trial or in any of their briefs that their Episcopalian religious faith requires them to (1) hire priests suffering from depression, low self-esteem, and sexual identification ambiguity and authorize such priests to provide counseling to psychologically vulnerable parishioners; (2) allow

such priests to engage in oral sex with parishioners during the course of counseling; (3) demand that the parishioner be silent about the priest's sexual misconduct; or (4) assume a duty to act in the best interests of the parishioner and later breach this duty to protect the Diocese or the career of the priest.[4]

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[4] The briefs of two *amici curiae* assert, without citation to the record, that the Bishop's conduct was rooted in religious belief or practice. The brief of the American Association of Pastoral Counselors ("AAPC"), for instance, states that Tenantry sought religious counsel and that tort liability in this case was related to "the efficacy of the *religious* counsel the bishop provided in response to respondent's request." Brief of *amicus curiae* AAPC at 4, n.3 (emphasis added). The AAPC also asserts, again without citation, that the Bishop was held liable for "fail[ure] to provide [Tenantry] with the service of forgiveness." *Id.* at 5, n.3. The brief filed by the *amicus curiae* Colorado Catholic Conference ("CCC") and others makes the assertions that the Diocese and the Bishop were held liable for "negligent ordination," brief of *amicus curiae* CCC *et al.* at 8, and conducting a "confession [that was] unlawful." *Id.* at 7.

These assertions misrepresent the record and the basis for liability in this case. It is incorrect to state that Tenantry requested the meeting with the Bishop for religious counseling: the record indicates that the *Bishop* asked Tenantry's husband to ask Tenantry to meet with him to discuss Father Robinson's misconduct. Tr. VIII: 116. The Diocese and the Bishop were not held liable for "negligent ordination" or failure to provide some "service of forgiveness" or "unlawful confession." They were held liable for failure to provide the Diocese's personnel file on Father Robinson to the parish and for making no effort to assist Tenantry, despite their knowledge of Tenantry's "extreme vulnerability," pet. app. A at 21a, except to insist that Tenantry not disclose Father Robinson's misconduct. Pet. app. A at 22a.

The Diocese and the Bishop never argued at trial that the failure to provide Father Robinson's file to the parish was a sincere requirement of Episcopalian ordination. Likewise, the

Because of this lack of proof, the Colorado Supreme Court properly found that the Diocese's and the Bishop's First Amendment defense was meritless. The Colorado Supreme Court held that "[a]pplication of a secular standard *to secular conduct* that is tortious is not prohibited by the Constitution." Pet. app. A at 16a (emphasis added). In

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Diocese and the Bishop never argued at trial that the Bishop's insistence on Tenantry's silence and his failure to provide any other help to Tenantry was sincere "religious counsel" required by the Episcopal Church's doctrines or practices. Rather, the Bishop testified that he asked for such silence to protect Father Robinson and avoid a "scandal" by insuring that his misconduct did not "become public knowledge" through "gossip." Tr. VIII: 123, 153. The Bishop also did not mention any religious doctrine or belief in explaining why he did not provide Tenantry with any secular assistance, such as referral to a psychiatrist. Tr. VIII: 125-26, 164-65.

The suggestion that these tortious acts and omissions were sincere religious practices is a *post hoc* rationalization made for the first time on appeal and, therefore, lacking any support in the record. The Diocese and the Bishop, however, have the burden of proving that their tortious conduct was rooted in a sincere religious belief with record evidence. *Yoder*, 406 U.S. at 209-16 (reviewing expert testimony and other record evidence before concluding that Amish's educational practices and religious beliefs were "inseparable and interdependent"). They cannot do so with the unsupported assertions of *amici*. Moreover, this Court must ignore such factual assertions that are based on matters outside the record. *Adickes v. Kress & Co.*, 398 U.S. 144, 157-58 n.16 (1970); *Russell v. Southard*, 12 How. (53 U.S.) 139, 158-59 (1851) ("This court must affirm or reverse upon the case as it appears in the record").

other words, the Colorado Supreme Court determined that the burdens imposed by tort liability in this case had not been shown to be burdens on anything but *secular* conduct.

This holding is consistent with every decision of this Court, all lower federal courts, and all state courts. It presents no unsettled or important question of federal law. Therefore, the petition of the Diocese and the Bishop should be denied.

B. Because the Diocese and the Bishop have never presented record evidence concerning how their tortious conduct was required by any sincerely held religious belief, this case presents no important or unsettled federal question concerning the "actual impact" of tort liability on religious beliefs.

The Bishop and the Diocese repeatedly state that the Colorado Supreme Court "undertook no analysis of the actual impact of the tort claims on petitioners' exercise of religious functions." Pet. at 5. According to the Diocese and the Bishop, the Colorado Supreme Court erred because it ruled against the Diocese's and the Bishop's free exercise defense "without even considering the extent of such a burden or the State's justification for imposing that burden." Pet. at 6.

The record in this case, however, does not permit any "analysis of the *actual* impact of the tort claims on petitioners' exercise of religious functions." Pet. at 5 (emphasis added). The Diocese and the Bishop declined to raise their free exercise defense to liability at trial.

They did not present evidence suggesting that their tortious conduct had some relation to religious beliefs. They raised their First Amendment defense for the first time on appeal to the Colorado Supreme Court as an abstract, hypothetical claim unsupported by record evidence.

Therefore, the petition should be denied because this case raises no unsettled or important issue of federal law regarding the impact of tort liability on religious beliefs. Lacking a record on which to assess such impact, the Colorado Supreme Court properly addressed the Diocese's and the Bishop's free exercise defense as an abstract matter of general constitutional law, holding that "[a]pplication of a secular standard to secular conduct that is tortious is not prohibited by the Constitution," pet. app. A at 16a, and that "[t]he First Amendment to the United States Constitution does not grant religious organizations absolute immunity from tort liability," pet. app. A at 13a.

These general holdings are well-established and uncontroversial principles of constitutional law. The Colorado Supreme Court cannot be faulted for failing to examine in greater detail the actual burden on the Diocese's and the Bishop's specific religious practices because the factual record needed for such an examination does not exist in this case.

Free exercise defenses to common-law liability are necessarily dependent on specific facts developed at trial. *Yoder*, 406 U.S. at 215. The determination of the nature and especially the sincerity of an allegedly religious belief and the relation of such a belief to tortious conduct requires assessment of credibility and determinations of

fact by the trial court. The Diocese and the Bishop waived the presentation of such evidence. They cannot now argue that the Colorado Supreme Court should have considered evidence that does not exist because of their own inaction.[5]

C. The decision below raises no important or unsettled federal question concerning the application of RFRA because the Colorado Supreme Court did not rely on this Court's holding in *Employment Division, Dep't of Human Resources v. Smith* and did not hold that generally applicable laws are immune from scrutiny under the free exercise clause.

The Diocese and the Bishop repeatedly assert, without any citation to the Colorado Supreme Court's decision, that the court rested its opinion "entirely on the basis of *Employment Division, Dep't of Human Resources v. Smith*, 494 U.S. 872 (1990)." Pet. at (i). According to the Diocese and the Bishop, the Colorado Supreme Court endorsed the theory that "tort judgments in this case are immune from constitutional scrutiny as the mere application of neutral, general rules." Pet. at 12.

These statements are distortions of the Colorado Supreme Court opinion, designed to concoct an important federal question from this otherwise uncontroversial

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[5] The Diocese and the Bishop cannot contend that they were unable to present their First Amendment defense until after the enactment of RFRA. Their statements in their petition before this Court contradict such a contention. According to the Bishop and the Diocese, their First Amendment defense does not depend on RFRA. Pet. at 7-8.

case by suggesting a conflict between the opinion and RFRA. The opinion, however, is completely consistent with RFRA and does not rely on this Court's decision in *Smith*. Therefore, the Diocese's and the Bishop's petition should be denied because this case raises no important or unsettled question regarding the application of RFRA. Sup. Ct. R. 10.1(c).

Nowhere does the Colorado Supreme Court hold "that this case was controlled by [*Smith*]." Pet. at 12. To the contrary, the court cited *Smith* in passing only once, in a string citation to other authorities. Pet. app. A at 16a. The opinion does not discuss *Smith*, and it does not rely on *Smith*'s holding that generally applicable, religiously neutral laws never unconstitutionally burden the free exercise of religion. The Colorado court does not state or imply that generally applicable common-law rules are "immune from constitutional scrutiny," as the Diocese and the Bishop suggest. The court holds only that tort liability in *this* case had not been shown to burden the Diocese's and the Bishop's free exercise of religion.

The opinion includes a statement that "[b]ecause . . . neutral principles of law can be applied, the First Amendment is not a defense against Tenantry's claim." Pet. app. A at 17a. However, understood in the context of this case, this statement has nothing to do with *Smith* and does not hold that tort liability can always be imposed for conduct arising from genuine religious belief.

In their briefs to the Colorado Supreme Court, the Diocese and the Bishop relied on this Court's decisions holding that courts must resolve disputes over church property "without resolving the underlying controversies

over religious doctrine." *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 450 (1969). *See also Jones v. Wolf*, 443 U.S. 595 (1979); *Serbian Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976); *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1871). *See also* Laurence Tribe, *American Constitutional Law* § 14-11, at 1233-42 (2d ed. 1988). In order to determine title to church property, these cases hold that courts must rely on "neutral principles of law, developed for use in all property disputes." *Presbyterian Church*, 393 U.S. at 449.

In rejecting the argument of the Diocese and the Bishop, the Colorado Supreme Court correctly held that this case did not "require interpreting and weighing [of] church doctrine" but rather allowed application of "neutral principles of law" to determine the liability of the Diocese and the Bishop. Therefore, the Colorado court held that the tort judgment in this case is consistent with this Court's jurisprudence in *Presbyterian Church*, *Jones*, *Serbian Orthodox Diocese*, and *Watson* because this case does not require the trial court to resolve controversies over religious doctrine. The court was applying the "neutral principles" doctrine explained by this Court in *Presbyterian Church*. Pet. app. A at 15a. Nothing in this uncontroversial holding has anything to do with *Smith* or implies that "tort judgments . . . are immune from constitutional scrutiny" because they are based on general, religiously neutral principles of law. Pet. at 12.

In short, the Colorado Supreme Court's decision presents no important, unsettled, or disputed issue of law. The court held that common-law liability for secular conduct does not burden the free exercise of religion. This uncontroversial proposition is consistent with this Court's pre-*Smith* jurisprudence and RFRA. Under the

considerations governing review on writ of certiorari contained in Sup. Ct. R. 10.1, this Court should deny the petition of the Diocese and the Bishop as lacking an important federal question over which there has been any dispute among state or federal courts.[6]

II. Under this Court's well-settled precedents, RFRA should not be applied retroactively to this case.

The Religious Freedom Restoration Act, P.L. 103-141, 107 Stat. 1488 (1993), was enacted on November 16, 1993, one day after the Colorado Supreme Court issued its decision in the instant case. The Diocese and the Bishop request that this Court vacate a decision affirming a judgment reached after a ten-day trial and remand this case for determination of whether RFRA should apply retroactively to this case even though this case was tried to judgment, appealed, and decided by the Colorado Supreme Court prior to the enactment of RFRA.

This Court's well-settled precedents concerning retroactivity dictate that RFRA not be applied retroactively

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[6] The Diocese and the Bishop suggest that this case involves a claim of "clergy malpractice." Pet. at 11-12. This suggestion is incorrect. Colorado does not recognize an action for clergy malpractice. *DeStefano v. Grabrian*, 763 P.2d 275, 285 (Colo. 1988). Moreover, Tenantry never pled any claim for clergy malpractice. Finally, the Colorado Supreme Court's holding concerned "secular conduct." Pet. app. A at 16a. As the Colorado Supreme Court explained, this case does not involve any dispute over Father Robinson's or Bishop Frey's conformity to any religious doctrines or religious standards of conduct. Pet. app. A at 17a, n. 13. Therefore, issues of clergy malpractice are irrelevant to this case.

to this case. There is no indication in either the language or legislative history of RFRA that Congress intended to extend RFRA's application retroactively to overturn judgments entered prior to the statute's enactment. Absent such clearly expressed Congressional intent, the traditional presumption is that RFRA applies prospectively only. Because there is no important or unsettled federal question regarding the retroactivity of RFRA, this Court should deny the Diocese's and the Bishop's petition. Sup. Ct. R. 10.1(c).

A. Nothing in section 6 of RFRA indicates a Congressional intent to apply RFRA to cases that have been tried to judgment before the statute's enactment.

In determining retroactive application of RFRA, the first question to be addressed is the language of the statute. *Landgraf v. U.S.I. Film Products*, 62 U.S.L.W. 4255, 4265 (April 26, 1994); *Kaiser Aluminum v. Bonjorno*, 494 U.S. 827, 837 (1990). The Diocese and the Bishop argue that section 6 of RFRA indicates that Congress intended RFRA to be applied retroactively to judgments entered prior to the statute's enactment. However, the statutory language and legislative history of section 6 reflect no such intent.

Section 6 provides that:

> [t]his Act applies to all Federal and State law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after the enactment of this Act.

Without citing any authority, the Diocese and the Bishop contend that "the effort to prosecute and collect a tort judgment under state law is plainly 'an implementation of that law,' and thus is subject to the terms of the Act at any time prior to final judgment."

Contrary to the novel construction of the term "implementation" offered by the Diocese and the Bishop, "implementation" does not refer to judgments entered by a court of law. Rather, "implementation" refers to *administrative agencies'* promulgation of regulations, rules, or other general policy statements to carry out the purposes of a statute. This interpretation of the term "implementation" to mean "regulation by an administrative agency" reflects Congress' traditional use of the term "implementation."[7]

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[7] *See, e.g.*, 5 U.S.C. § 551(4) (" 'rule' means the whole or part of an agency statement of general or particular applicability and future effect designed to *implement* . . . law or policy"); 5 U.S.C. § 552b(g) ("Each agency . . . shall . . . promulgate regulations to *implement* the requirements of . . . this section"); 7 U.S.C. § 3603 ("agencies shall issue such regulations as they determine are necessary to *implement* this Act"); 12 U.S.C. § 1823(j)(3) ("Federal banking agency shall issue regulations *implementing* this subsection"); 15 U.S.C. § 2512(c)(2) ("Administrator . . . shall *implement* . . . the evaluation program by promulgating . . . regulations"); 16 U.S.C. § 2436 ("The Secretary of Commerce . . . shall promulgate such regulations as are necessary and appropriate to *implement* the provisions of this title"); 33 U.S.C. § 1288(j)(7) ("The Secretary . . . shall . . . promulgate regulations . . . for *implementation* of this subsection"); 42 U.S.C. § 7410(a) (requiring that "[e]ach State shall . . . adopt and submit to the Administrator . . . a plan which provides for the *implementation* of [ambient air quality standard]") (emphasis added to all statutes listed above).

Judgments are very different from regulatory "implementations." Unlike administrative regulations, judgments entered by a court of law are not rules generally applicable to persons at large: judgments govern only the specific parties to an action and their proxies.

Because "the ordinary and obvious meaning of [a] phrase is not to be lightly discounted," *I.N.S. v. Cardozo-Fonseca*, 480 U.S. 421, 431 (1987), the phrase "implementation of . . . law" should be construed to refer to administrative regulation, not judgments from courts. Congress' plain intent in including section 6 of RFRA was to insure that RFRA would apply to administrative agencies' regulations just as it applies to statutes. Nothing in the language of section 6 suggests that Congress intended to extend RFRA's application to judgments entered before RFRA's effective date.

The legislative history of RFRA also indicates no Congressional intent to extend RFRA's application to judgments entered prior to its enactment. According to the section-by-section analysis of RFRA in the Senate Judiciary Committee Report,

> [Section 6] states that the act applies to all existing State and Federal *laws*, and to all such *laws* enacted in the future. It also provides that authority it confers on the government should not be construed to permit any government to burden any religious belief.

S. Rep. No. 103-111, 103rd Cong., 1st Sess. at 8-9, *reprinted in* 1994 U.S.C.C.A.N. 1892, 1905 (emphasis added). Judgments are not "laws": unlike "laws," judgments govern

only the parties to the litigation or their proxies. Therefore, the Senate Report, like the statutory language, indicates that section 6 was not intended to apply RFRA retroactively to judgments entered prior to its enactment.

B. Because there is no clear Congressional command to apply RFRA retroactively, RFRA should be construed not to apply to this case, which was tried to judgment prior to the statute's enactment.

As explained above, there is no clearly expressed Congressional intent to apply RFRA retroactively to cases tried and decided prior to its enactment. Absent such clearly expressed intent, this Court applies the traditional presumption that statutes should not be given retroactive effect. *Landgraf*, 62 U.S.L.W. at 4266; *Kaiser Aluminum*, 494 U.S. at 841 (Scalia, J., concurring) ("absent specific indication to the contrary, the operation of nonpenal legislation is prospective only"); *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208 (1988) ("[r]etroactivity is not favored in the law. Thus, congressional enactments . . . will not be construed to have retroactive effect unless their language requires this result"); *United States v. Security Industrial Bank*, 459 U.S. 70, 78 (1982) ("The principle that statutes operate only prospectively . . . is familiar to every law student").

As this Court recently stated in *Landgraf*, "the presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic." *Landgraf*, 62 U.S.L.W. at 4261. Guided by this ancient presumption, this Court

"ha[s] declined to give retroactive effect to statutes burdening private rights unless Congress had made clear its intent." *Id.* at 4263.

Applying this well-settled presumption, this Court should abstain from applying RFRA here because RFRA "would have genuinely 'retroactive' effect" if it were applied to this case. *Landgraf*, 62 U.S.L.W. at 4265. By changing the scope of religious immunity from secular law, RFRA affects Tenantry's substantive private right to recover compensatory damages for injuries resulting from the tortious conduct of the Diocese and the Bishop.[8] Therefore, RFRA should not be applied retroactively "absent clear congressional intent favoring such a result." *Landgraf*, 62 U.S.L.W. at 4266. Because there is no such clearly expressed intent, the Diocese's and the Bishop's petition should be denied.

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[8] RFRA's application to this case does not involve (1) rules of procedure; (2) the availability of *prospective* injunctive relief; and (3) the jurisdiction of courts and other tribunals. Such statutes may sometimes be applied retroactively even absent specific legislative authorization. *Landgraf*, 62 U.S.L.W. at 4264-65; *Bradley v. Richmond School Bd.*, 416 U.S. 696 (1974); *Thorpe v. Housing Authority of Durham*, 393 U.S. 268 (1969).

CONCLUSION

Congress did not intend RFRA to be applied to judgments entered before the statute's enactment. Moreover, assuming *arguendo* that RFRA applies retroactively to this case, the Colorado Supreme Court's decision correctly applied the legal standards codified in RFRA by applying uncontroversial, universally accepted principles of constitutional law. Therefore, the Court should deny the petition of the Diocese and the Bishop.

Respectfully submitted,

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